No. 15,009

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of Application for Citizenship of:

ALEJO TRABOCO TANO, et al.,

Appellants,

vs.

UNITED STATES IMMIGRATION AND NATURALIZATION DEPARTMENT,

Respondent.

APPELLANTS' OPENING BRIEF.

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PRELIMINARY STATEMENT.

This is a consolidated appeal on behalf of seven appellants who filed petitions for naturalization on March 31, 1955. The Naturalization Examiner entered findings of fact and conclusions of law on August 17, 1955, recommending that the petitions be denied, and the petitions came on for hearing on August 23, 1955, in the United States District Court for the Northern District of California, Southern Division, Judge Louis E. Goodman presiding. The written opinion and order of the Court was filed on October 25, 1955, denying

the petitions. Findings of fact and conclusions of law were lodged by the United States and by petitioners on November 3, 1955, and the Court entered its findings of fact and conclusions of law and order denying the petitions on November 4, 1955. Notices of appeal were filed on behalf of all petitioners on December 2, 1955, and on the same day, the District Court ordered the cases consolidated for any further proceedings. This Court granted the motion of appellants for leave to appeal on a typewritten record.

This Court has jurisdiction of the appeal under Section 1291 of Title 28, United States Code.

STATEMENT OF FACTS.

The only real issue presented by these petitions for naturalization and by this appeal, is whether or not the appellants have met the residence requirement which entitles them to be naturalized. The Government has never contended, nor is there any finding by the Court below, that these petitioners have not satisfied the other requirements for naturalization (set forth in 8 U.S.C.A. §1427). If, as a matter of law, the appellants have met the residence requirement, they are entitled to naturalization.

The changes in the law pertaining to the residence requirement are set forth in the opinion of the District Court and will not be repeated here. In short, the requirement that a petitioner has resided within the United States for five years, was dispensed with by

Section 325(a) of the Nationality Act of 1940, as to seamen who earned five years sea time on American vessels, whether or not such seamen had been admitted to the United States for permanent residence. 54 Stat. 1150, 8 U.S.C. §725(a), 1946 ed. This section was amended by the Internal Security Act of 1950, 64 Stat. 987, to provide that only seamen who had first been admitted to the United States for permanent residence could substitute sea time on American vessels for residence within the United States. This provision of the Internal Security Act of 1950 was substantially re-enacted in the Nationality Act of 1952, 66 Stat. 163, with the added provision that seamen could claim the benefits of the 1940 Act as it stood prior to its amendment by the Internal Security Act of 1950, if such seamen filed their petitions for naturalization before December 24, 1953.

The Nationality Act of 1952 also contains an extremely comprehensive savings clause which provides in material part:

> "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . petition for naturalization . . . which shall be valid at the time this Act shall take effect; or to affect any . . . right in process of acquisition, act, thing, . . . or matter . . . done or existing at the time this Act shall take effect; but as to all such . . . rights, acts, things, . . . or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect . . ."
>
> §405(a), 66 Stat. 280, 8 U.S.C. §1101 note.

Section 403(42) of the 1952 Act specifically repealed the entire 1940 Act in these words:

> "(a) The following acts and all amendments thereto and parts of acts and all amendments thereto are repealed: . . . (42) Act of October 14, 1940 (54 Stat. 1137) . . ."

None of the appellants has been admitted to the United States for permanent residence. The District Court found that appellants Tano, Elizalde, and Romano have earned at least five years sea time prior to September 23, 1950; the District Court also found that appellants Polintan, Magallanes, Martinez, and Abella have earned 11 days, 27 days, 45 days, and 702 days, respectively, less than five years sea time prior to September 23, 1950. Each of the latter group of appellants was signed on by the Military Sea Transportation Service (MSTS) in his native country, The Philippines, at the end of World War II when there was a great shortage of men to man the ships of that service. In 1949 each of these appellants was discharged, against his will, from his ship while in port in the United States, and was ordered by the MSTS to stay ashore subject to recall at any time for service on a MSTS vessel. Each of them spent some time ashore under these conditions and each was later recalled for further service on MSTS vessels. Appellant Abella, in addition, served ashore in the Philippines from March, 1944, until July, 1946, as a clerk for the United States Maritime Commission, in the personnel section. These varying amounts of shoreside service were not counted by the District Court in computing the sea time earned by this latter group of appellants.

All of the appellants offered evidence to show that between December 24, 1952, and December 24, 1953, they had attempted to file petitions for naturalization, but were told by a clerk of the Immigration Service that they had insufficient sea time and that they should not file their petitions. They contended below that in view of the fact that they were not thoroughly familiar with the language and customs of this country, that they had done all that could reasonably be expected of them in filing their petitions before December 24, 1953, and had thus substantially complied with §330(a)(2) of the 1952 Act. The District Court ruled against this contention and that ruling constitutes its only conclusions of law. But the written opinion of the District Court indicates that the District Court concluded that these appellants cannot claim any benefits under the savings clause of the 1952 Act, solely for the reason that those benefits could not be claimed immediately prior to the enactment of the 1952 Act.

SPECIFICATION OF ERRORS.

1. The District Court erred in denying petitioners' petitions for naturalization in that the District Court failed to hold that each petitioner's condition, status and rights in process of acquisition, earned under Section 325 of the Immigration and Nationality Act of 1940, were preserved by the savings clause of the Immigration and Nationality Act of 1952.

2. The District Court erred in denying petitioners' petitions for naturalization in that the District Court

failed to hold that the first attempt of each petitioner to file his petition for naturalization, which attempts were made within the time limit set forth in Section 330(a)(2) of the Immigration and Nationality Act of 1952, constituted a substantial compliance with the requirement of that section that such petitions be filed before the specified date.

3. The District Court erred in denying petitioners' petitions for naturalization in that the District Court failed to hold that periods of time in which several of the petitioners served within the continental United States under orders of the United States Military Sea Transportation Service, should be credited with sea time to satisfy the residence requirement of Section 330(a)(2) of the Immigration and Nationality Act of 1952.

4. The District Court erred in denying petitioners' petitions for naturalization in that the District Court rejected petitioners' evidence of their attempts to file petitions for naturalization before the time limit set forth in Section 330(a)(2) of the Immigration and Nationality Act of 1952.

5. The Findings of Fact and Conclusions of Law of the District Court are clearly erroneous because they are insufficient and are based upon an erroneous view of the law.

ARGUMENT.

I.

PETITIONERS' ELIGIBILITY FOR CITIZENSHIP UNDER THE NATIONALITY ACT OF 1940 WAS PRESERVED BY THE SAVINGS CLAUSE OF THE 1952 ACT.

The savings clause of the 1952 Act provides that statutes repealed by the 1952 Act are continued in force and effect as to certain matters enumerated in the savings clause, and that these matters are unaffected by anything in the 1952 Act "unless otherwise specifically provided therein." The enumeration of the matters which are saved by the savings clause falls into two groups which are divided by a semicolon. The first group includes the "validity of any declaration of intention, petition for naturalization . . . or other document or proceeding which shall be valid at the time this Act shall take effiect;" while the second group includes "any prosecution, suit, action . . . civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, *done or existing at the time this Act shall take effect;*" (emphasis supplied). Thus it is clear that the first group includes certain documents and proceedings which are *valid* when the Act takes effect, but that the second group extends to all acts, things and matters which are merely *done or existing* at the time the Act takes effect. Congress imposed the requirement of validity as to the first group of matters saved, but eliminated this requirement as to the second group. As to any status, condition, right in process of acquisition, act, thing, or matter, it is not necessary that they be valid

immediately prior to the 1952 Act, but only that they be done or existing. The act of each appellant in completely or partially fulfilling the requirements for sea time as residence under the 1940 Act was an act, thing, matter, status, condition or right in process of acquisition done and existing at the time the 1952 Act took effect, and therefore this claim is saved to them.

Furthermore the savings clause clearly provides that as to these acts, things, matters, etc., the statutes repealed by the 1952 Act are continued in force and effect; thus the savings clause itself specifies what law is to govern these matters. The entire Nationality Act of 1940 was repealed by the 1952 Act, as shown above; therefore, Section 325(a) of the 1940 Act, under which these petitioners claim, is the law specified by the savings clause to govern the claims of these appellants.

There is no basis whatever in the savings clause for the view taken by the District Court that the savings clause extends only to things that were valid immediately prior to the enactment of the 1952 Act. The only test set forth in the savings clause is that the acts, things or matters be done before the 1952 Act took effect and that they gain legal significance from statutes which are repealed by the 1952 Act.

This construction of the savings clause has been adopted by numerous courts. In construing the savings clause of the 1940 Act, Section 347(a) of that Act, 8 U.S.C. §747(a), 1946 ed., which was the forerunner of the savings clause of the 1952 Act and is

substantially similar to it, the Court in the case of *In re Urmeneta,* D. Wis., 42 F. Supp. 138, 140, stated:

> "Section 347(a) provides, in effect, that statutes . . . which are repealed by this Act shall not be affected thereby, but shall be continued in force and effect with respect to any thing, act, or matter existing at the time the said Act takes effect. Petitioner's 'Act' in withdrawing his declaration of intention 'existed' at the time the Act went into effect."

The *Urmeneta* case held that an alien who withdrew his declaration of intention at a time when this barred him from citizenship was not entitled to naturalization under the 1949 Act, even though the 1940 Act repealed that bar. Compare *Petition of Otness,* N.D. Cal., 49 F. Supp. 220. Similarly in *Benzian v. Godwin,* 2 Cir., 168 F. 2d 952, *cert. denied,* 335 U.S. 886, the Court held that an alien who applied for suspension from the Selective Service Act at a time when that action barred him from citizenship, was ineligible for naturalization although another statute had provided in the meantime that such an act would not bar an alien from citizenship. See also *Mannerfrid v. United States,* 2 Cir., 200 F. 2d 730, *cert. denied,* 345 U.S. 918. In *Savorgnan v. United States,* 7 Cir., 171 F. 2d 155, 158, the Court said this of the savings clause of the 1940 Act:

> "This section provides that nothing in Chapters III or V of the Act, unless otherwise provided therein, shall be construed to affect 'any act, * * * done or existing, at the time this Act shall take effect; but as to all such * * * acts, * * * the stat-

> utes * * * repealed by this Act, are hereby continued in force and effect.' "
>
> "Section 2 of the Act of March 2, 1907, was specifically repealed by Section 504, Chapter V, of the 1940 statute. It would appear that becoming naturalized in a foreign state in conformity with its laws is an 'act' within the meaning of the above-quoted provisions of Section 347, and that, therefore, the provisions of Section 2 of the 1907 statute would continue to govern . . ."

Appellants' contention as to the proper construction of the savings clause is squarely supported by the holding of the Second Circuit in *United States ex rel. Zacharias v. Shaughnessy*, 2 Cir., 221 F. 2d 578. In that case an alien had entered this country in 1951 and was admittedly deportable at all times. In August of 1952 he married an American citizen who filed an application for an immigration visa for her husband in September of 1952, so that he might legally enter this country from Canada. This application was later denied. In 1953 he was ordered deported and he then filed a request for voluntary deportation. This request was administratively denied on the ground that he had failed to establish good moral character as it is defined in the 1952 Act. His petition for a writ of habeas corpus presented the question of whether he should have his moral character judged by the standards of the 1952 Act, or whether he was entitled to have it judged according to the law in effect at the time his wife applied for an immigration visa for him. In stating and answering this question the Court said:

> "Did the filing of the petition for issuance of an immigration visa by his American wife give

Zacharias 'any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing,' at the time the 1952 Act went into effect? If so, under §405(a) of that legislation, 8 U.S.C. §1101 note, his case must be governed by prior statutes unless otherwise specifically provided . . . We conclude that the preliminary application for the visa in September, 1952, was sufficient to bring Zacharias within §405(a). *This application was the first step in his effort to attain a legal status in this country.* . . . Since we hold that Zacharias on December 24, 1952, had a status, condition, right in process of acquisition, act, thing, or matter then done or existing, this decision of the Board and its affirmance by the district court are in error unless some other specific provision of the 1952 Act takes this case out of the scope of §405(a). We find no such exception here. *It is true that the general deportability section, 8 U.S.C. §1251, is specifically made applicable to cases arising before enactment of the new statute;* but Zacharias does not contest his deportability. The relevant sections governing voluntary departure and defining good moral character, 8 U.S.C. §§1254(e) and 1101(f)(2), say nothing about retroactive application. This case, therefore, like United States v. Menasche, supra, should be governed by the pre-1952 law." (Emphasis supplied.)

221 F. 2d at 580-581.

The sole reason for the Court in the *Zacharias* case applying prior law to the matter there in issue, was that an act, thing or matter had been done before 1952 which was done or existing on December 24, 1952—an act which was the first step in attaining a legal status

in this country. The Court considered it irrelevant that at all times Zacharias was deportable. Obviously he had no "rights" and he was not eligible for anything when the 1952 Act took effect; the sole basis for saving prior law as to him was an act done prior to 1952. The position of the appellants here is much stronger than that of Zacharias, because prior to 1952 they had taken all of the steps necessary to entitle them to naturalization—not just the first step—and therefore under the *Zacharias* case, as well as the other cited cases, these appellants are entitled by the savings clause to have their acts governed by the law in effect at the time those acts took place.

II.

THE 1952 ACT DOES NOT "OTHERWISE SPECIFICALLY PROVIDE" FOR APPELLANTS.

The savings clause of the 1952 Act provides that nothing is saved by that clause if the 1952 Act "otherwise specifically provides therein" that it should not be saved. The Government contended below that Section 330(a)(2) of the 1952 Act otherwise specifically provides for petitioners. This section contains an affirmative grant of the rights sought by appellants here, as to all petitions for naturalization filed between December 24, 1952 and December 24, 1953, but it contains no language whatever stating that these rights are not to be granted as to petitions filed at other times, or that these rights are not to be saved by the savings clause of the 1952 Act. Respondent's position on this

point can only be sustained if a negative implication is to be read into Section 330(a)(2), and petitioners strongly contend that no such negative implication can be read into that section, and that the holding of *United States v. Menasche,* 348 U.S. 528, requires that no such negative implication be read into that section.

Section 330(a)(2) provides in substance that sea time earned before the 1950 Act, shall be deemed to satisfy the residence requirement of the 1952 Act if the seaman files his petition for naturalization within one year from the effective date of the 1952 Act (December 24, 1952). Obviously this section does not specifically provide that such sea time shall *not* be deemed to satisfy the residence requirement of the 1952 Act if the seaman files his petition more than one year after the effective date of the 1952 Act. Therefore, in no sense can it be said that this section "specifically provides" that petitioners are stripped of rights otherwise saved by the savings clause.

The Government contends that this section should be read to say something like the following:

> "No sea time earned prior to the effective date of the 1952 Act can be deemed to satisfy the residence requirement of the 1952 Act if the seaman files a petition for naturalization more than one year after the effective date of the 1952 Act."

This would plainly constitute a judicial rewriting of the statute, and only by such a rewriting can the petitioners be said to be "otherwise provided for in the 1952 Act."

The holding in the *Menasche* case not only supports the position of appellants here, but actually presents a much stronger, holding, on its facts, than is required in the instant case. The holding in *Menasche* involved Section 405(b) of the 1952 Act, which reads as follows:

> "Except as otherwise specifically provided in Title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed."

The Government contention in the *Menasche* case was that even if Menasche had rights which could be saved by Section 405(a), (which is the section under which appellants here claim), that Menasche was "otherwise specifically provided for" by Section 405(b), and therefore Menasche's rights were not effectively saved. In this regard the Government urged that Section 405(b) should be read to contain a negative implication something like the following:

> "No petition for naturalization filed after the effective date of this Act shall be heard and determined in accordance with the requirements of law in effect when such petition was filed."

The Supreme Court held that Section 405(b) did not embody any such negative implication, and that therefore it did not specifically provide for Menasche. The Court said:

> "As we read the statute, subsection (b) merely implements and emphasizes the operation of its forerunner. It is clear, first, that subsection (b) is not a specific exception to §405(a), since *both*

> subsections state that prior law should apply in certain circumstances. The slight negative implication derived from the fact that §405(b) applies to *pending* petitions for naturalization, and not to those filed after the effective date of the new Act, is overcome by the broad sweep of §405(a) and its direction that prior law applies unless the Act 'otherwise *specifically* provide[s].' " (Emphasis by the Court.)
>
> 348 U.S. 528, 536-537.

This holding is a plain bar to the interpretation urged by the Government here. A second holding of the *Menasche* case goes even further in rejecting the Government interpretation. After holding that Menasche's rights were saved by Section 405(a) and were not denied by the slight negative implication in Section 405(b), the Supreme Court examined Section 316(a) of the 1952 Act, 8 U.S.C.A. §1427(a), which imposed the new physical presence requirement, to determine whether it "otherwise specifically provided" that the new Act should apply to Menasche. Section 316(a) provided that no person "unless otherwise provided in this Title," shall be naturalized unless he had been physically within the United States for at least half of his five years of residence; Menasche was not able to meet that requirement. Section 316(a) was included in Title III of the Act, while the savings clause (Section 405(a)) was in Title IV; therefore the express negative of Section 316(a) barred Menasche on its face. Yet the Supreme Court held that this section did not "otherwise specifically provide" that Menasche's rights within the savings clause were

not to be saved. Appellants here are not included in any express negative provision which would bar them from the benefits they seek; hence it is even more clear that they are not otherwise specifically provided for, than was the case with Menasche.

The Supreme Court held in effect in the *Menasche* case that rights saved by the savings clause are not lost unless other provisions in the 1952 Act specifically provide that they are to be lost, and that no negative implications can be considered a substitute for a specific provision.

It is also important to note that in the *Menasche* case the Supreme Court held that Section 405(b) did not "otherwise specifically provide" for Menasche, even though that section granted affirmatively, as to petitions filed earlier than Menasche had filed his petition, the relief sought by Menasche. This holding disposes of the contention that Section 330(a)(2) "otherwise specifically provides" for appellants because it grants the relief they seek, as to petitions filed earlier than they filed their petitions.

III.

THE FINDINGS OF THE LOWER COURT ARE ERRONEOUS AND ARE INSUFFICIENT TO SUPPORT THE ORDER DENYING THE PETITIONS.

Appellants first wish to point out that a reading of the findings of fact and conclusions of law entered by the lower Court, in light of the testimony received and the issues raised on the trial, plainly reveals that

they are inadequate for a proper determination of the legal issues on this appeal, and for that reason the cases should be sent back for retrial, or for amended findings at the very least. As the Court said in *Stasiukevich v. Nicolls*, 1 Cir., 168 F. 2d 474, 478, 480:

> "On the record before us, this meager finding is insufficient to enable us to perform our appellate function intelligently."
>
> "In view of the generally sketchy and unsatisfactory character of the present record, we think that the case should be retried, instead of being sent back merely for more detailed findings."

Appellants insisted at the trial, and urge here on appeal, that they attempted to file their petitions for citizenship at various times between 1950 and 1953 and were prevented from doing so by agents of the Immigration and Naturalization Service, and that as a matter of law, this constituted a substantial compliance with the requirements that the petitions be filed before certain dates.

Finding V of the findings of fact as to each petitioner recites that they did not attempt to file their petitions within the period prescribed by the 1952 Act, and finding VI as to petitioners Tano, Elizalde and Romano recites in addition that these petitioners "did not file a Petition for Naturalization prior to September 23, 1950." Conclusions of law I and II recite that each of the petitioners has failed to establish compliance with Section 330(a)(2) of the 1952 Act and may not be naturalized under that Act.

The District Court emphatically stated his views as to the law on this point (Transcript, page 107):

> "I can tell you now, . . . it doesn't make any difference what any officer of the government says about any statute. There is no case that has ever been called to my attention . . . by which the United States is ever estopped by the conduct of any officer as to the rights of a person who is required to take certain steps."

Appellants contend that this view is in error as a matter of law. In *Moser v. United States,* 341 U.S. 41, the Supreme Court had before it a situation in which a Swiss alien had submitted an application to be exempted from the draft, and that application was sufficient to bar him from citizenship. But the evidence showed that he had submitted the application on the erroneous advice of the Swiss Legation that such an application would not bar him from applying for American citizenship. In holding that he was not barred from becoming a citizen under those circumstances, the Court said (341 U.S. at 47):

> "There is no need to evaluate these circumstances on the basis of estoppel of the Government or the power of the Swiss Legation to bind the United States by its advice to petitioner. Petitioner did not knowingly, intentionally waive his rights to citizenship. In fact, because of the misleading circumstances of this case, he never had an opportunity to make an election between the diametrically opposed courses required as a matter of strict law."

It was also stated as a general rule, after an extensive review of the authorities, in *United States v. Certain Parcels of Land,* S.D. Cal., 131 F. Supp. 65, 74:

> "Briefly put, then, in cases where sovereign immunity to suit has been waived, the Government can be estopped by the conduct of its agents in the same circumstances as a private individual, partnership, or corporation."

The record shows that the agents of the Immigration Service were clearly acting within the scope of their authority in advising petitioners, and others similarly situated, as to their eligibility for naturalization, and deciding whether or not to offer the petitioners a petition to file. Transcript, pages 115-120. The testimony of the petitioners also clearly reveals that the petitioners relied to their detriment upon the statements of the various clerks that their applications would be mailed to them (and they never were), or that they were ineligible for citizenship, or that they could not file their applications at that time. Petitioners urge this Court to hold that the Court below was in error as a matter of law, and that such evidence is sufficient in law to effect a filing of the petitions on the dates involved. These petitioners were not familiar with the laws and customs of this country, and had employed every reasonable means at their command to accomplish a filing of their petitions. The Government is bound by the acts of its agents; furthermore, since the appellants either thought they were filing, or that they were going to be allowed to file, at the first time they were able to do so, they never had an opportunity to choose between filing and not filing (because they were misled into thinking that they could not file, or that the papers to be filed would

be sent to them), and therefore they come within the rule of the *Moser* case, supra.

More important, the findings of fact to the effect that petitioners did not attempt to file are clearly erroneous and must be reversed. There is no evidence whatever to rebut their testimony that they asked for applications and were refused. Only two witnesses testified for the Government on this issue, Finnegan and Baldwin. Baldwin stated that he is an examining clerk, United States District Court. Transcript, page 121. Since all of the transactions took place at other offices, his testimony does not support the finding. Finnegan stated that he was an applications examiner for the Immigration and Naturalization Service at their offices at 630 Sansome Street, in San Francisco. He testified that if a seaman with four and one-half years of sea time asked for an application, he would offer the seaman an application "if he asked and insisted on it" and that "after I talked to him and found out he isn't eligible, *and he wouldn't take my advice,* I probably would give it to him." (Emphasis supplied; Transcript pages 118-119.) In answer to a question by the Court he stated that if someone comes in to inquire into their status and finds out they are not eligible, that usually ends the matter in "99 cases out of a hundred." (Transcript, page 119.) And when counsel for petitioners pointed out that two of the petitioners had testified that they had specifically requested petitions from Mr. Finnegan and that their requests had been denied, the Court answered with a statement that seems to sum up its approach to this testimony:

> "I don't think it is in the record. If it is in the way you say it is, I wouldn't believe it. My examination of these men leads me to the view that the facts are the way they gave them to me in answer to the questions I put." (Transcript, page 120.)

The definition of what constitutes a finding that is "clearly erroneous" has been laid down in the case of *United States v. Oregon Medical Society,* 343 U.S. 326, 339, as follows:

> ". . . when, *although there is evidence to support it,* the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis supplied.)

This rule plainly contemplates that there must be *some* evidence in the record to support a finding, before it can possibly be sustained, and accordingly it has been held that findings are clearly erroneous when (1) not supported by substantial evidence, (2) contrary to a clear preponderance of the evidence, or (3) based on erroneous views of the law. *Magidson v. Duggan,* 8 Cir., 212 F. 2d 748, *cert. denied,* 348 U.S. 883, 922; *Western Cottonoil Co. v. Hodges,* 5 Cir., 218 F. 2d 658. No evidence whatever appears in the record to support the finding in each case that the petitioners did not attempt to file their petitions prior to 1953, and furthermore those findings were based on an erroneous view of the law, and hence are clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure, and must be set aside.

Likewise the Court below made a finding that four of the petitioners had earned less than five years of sea time prior to September 23, 1950, refusing to count time spent by these petitioners ashore in the United States when they were ordered in 1949 by the Government shipping agency by whom they were employed (MSTS) to stand by and await further orders to ship out. They were subject to recall at any time by the MSTS, and in fact they were later recalled by that agency and earned further sea time. During this time petitioner Magallanes actually worked as a civilian for the Government at Treasure Island. And in addition, petitioner Abella worked in the Philippine Islands as a clerk for the United States Maritime Commission. Petitioners were entitled to have this time included with the sea time earned by them, as a matter of law, and in refusing to so find, the Court below erred.

The types of service that will be counted toward the residence requirement of Section 325(a) of the 1940 Act has already been extended beyond the precise terms of that section. In *United States v. Camean,* 2 Cir., 174 F. 2d 151, the Court held that service aboard vessels other than those specifically set forth in the statute was to be counted in computing the time earned under that section. The test laid down by Judge Learned Hand in that case for determining what types of service will be counted is regarded as the authoritative test:

> "Since we have to deal with a term which is not a word of art (in the case cited, 'not foreign vessels') and was apparently used in its colloquial

sense, it is especially proper to look to the purposes of the statute as a whole. These were apparently two, one of which was to allow a class of persons to become citizens, whose occupation prevents them from complying with the conditions imposed upon aliens in general: continuous residence in the United States. That condition is imposed because residence is regarded as a proving ground on which the alien's qualifications can be tried; and these are 'good moral character' and attachment 'to the principles of the Constitution'. Already in 1918 it was apparently recognized that service on shipboard would afford an equivalent opportunity for acquaintance with the alien, provided he served on 'documented' vessels, since he would be in one of the most intimate of occupational associations, a seaman among his shipmates. . . . *All that is important is that the alien's service shall expose him to a scrutiny which is the measurable equivalent of actual residence;* and as to that the holder of legal title is not relevant. Nor has that circumstance any greater relevance to the other purpose of Congress, which presumably was to secure citizen seamen to man our merchant marine in such numbers as the law required." (Emphasis supplied.)

174 F. 2d at 152-153.

In *Petition of Karadzas,* S.D. N.Y., 124 F. Supp. 25, this test was applied to time spent ashore in a Government school at New Orleans and certain time spent making voyages to and from the alien's ship, and it was held that such time should be counted under Section 330(a)(2) of the 1952 Act. The Court relied on the fact that "during the entire period, he was subject

to the control and discipline of the United States Government." See also *Application of Aguirre,* S.D. N.Y., 90 F. Supp. 668. It is beyond question that the application of this rule in the present case would require the various times in issue to be counted under the statute. The petitioners spent these times actually residing in the United States so that they were exposed to a scrutiny which was not only "the measurable equivalent" of actual residence, but in fact was actual residence, and they so spent that time at the request of the Government shipping agency which recruited them for sea service with the promise that if they spent five years of such service, they could become naturalized. Furthermore, it would be absurd to apply this section, which permits sea time to be counted in lieu of the customary actual residence, so as to exclude the customary actual residence itself. Therefore these periods of time must be counted toward the residence requirement of the statute, and the petitioners have thus satisfied that requirement, by earning five years before September 23, 1950.

CONCLUSION.

Therefore appellants earnestly contend: (1) that their eligibility for citizenship under the Immigration Act of 1940 was preserved by the savings clause of the 1952 Act; (2) that the 1952 Act does not specifically provide anything to the contrary, and therefore the 1952 Act does not "otherwise specifically provide" for appellants; (3) that the first attempt of each peti-

tioner to file his petition for naturalization, which was thwarted by the arbitrary conduct of the Immigration and Naturalization clerk, constituted substantial compliance with the requirement that such petitions be filed before certain dates, because each petitioner did everything he could reasonably be expected to do toward filing his petition; (4) that time spent ashore in the United States under orders of the MSTS should be counted with sea time to satisfy the residence requirement of Section 330(a)(2) of the 1952 Act; and (5) that the findings of fact and conclusions of law of the lower Court are either insufficient or in conflict with the foregoing principles, and therefore the decision of the lower Court must be reversed.

Dated, San Francisco, California,
May 21, 1956.

Respectfully submitted,
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